UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT.

No. 15,887.
Civil Action.

CLINTON FOODS, INC., a Delaware Corporation,
Appellant,

vs.

MARVIN YOUNGS,
Appellee.

Appeal from the United States District Court for the Southern District of Iowa.

APPELLANT'S ARGUMENT FOLLOWING WITHDRAWAL OF OPINION.

FOREWORD.

This argument is presented in the light of the Court's order of August 11, 1958, wherein it withdrew the opinions filed July 15, 1958, and granted appellee a rehearing. Appellant conceives that the points raised and urged by appellee in his Petition for Rehearing must have been the determining factors in the Court's granting of a rehearing and that the proper function of this argument is to respond to those points.

In briefs filed prior to the oral submission of the case, both parties discussed the matters raised in the Petition for Rehearing. However, it appears to appellant that appellee has unduly emphasized two factors present and has attempted to build them up to a status they do not deserve. Appellant therefore feels that it may have failed to devote sufficient effort toward discussion of these factors, to wit: the bus bar and warnings thereof; and the apparently insulated lead-in wire.

In directing this argument to these two factors, appellant in no sense intends to abandon or retreat from the points relied upon for reversal as set out in its previous briefs and arguments.

SIGNIFICANCE OF BUS BAR WARNINGS.

In requesting rehearing, appellee attempts to lead this Court to believe that **the pipe fitting crew**, of which he was a member, was repeatedly warned **by Clinton**, and that the members of that crew were misled thereby. Appellant contends that neither of these positions is supported by the record.

The testimony of the two employees of Clinton who testified to having warned about the bus bar indicates that the warnings about this hazard were given at the time that the ditch-digging crew was at work. On page 9 of the Record, Mr. Shannon, in his testimony about warning of the danger of the bus bar, indicates that he knew they were throwing dirt into the alley-way and creating a hazard. The pipe fitting crew did not throw dirt into the alley-way—that was done by the ditch diggers. He further testified that he went into detail one day over by the pump-house where it was 440 volts, "and where they were throwing dirt up there. * * * In that situation I specifically pointed out the bus bar because they had piled

the dirt so high you could walk right into it. I don't know who was present when I said that, I didn't pay any attention to the particular men" (Record p. 11). Is it likely that this warning was given to the pipe fitters who did not do any digging or throwing of dirt? Is it not more likely that this warning was given prior to the time that they ever entered the area?

Mr. Hartman testified to having warned Mr. Guy Muter about the bus bar but this warning came "at the time he first started digging in there" (Record p. 37): Mr. Youngs testified "I had nothing to do with the excavation of the ditch" (Record p. 28).

Mr. Morgan, appellee's foreman, testified that it was Stapleton who called his attention to the bus bar (Record p. 22). This Stapleton denies (Record p. 39).

There is no doubt that Morgan and the excavating crew had been warned about the bus bar. However, there is nothing to indicate that appellee had been warned about it by Clinton. No member of the crew other than Morgan testified to having been warned by Clinton.

Mr. Owen testified with reference to the warning about the bus bar, "It was Eddy told us. I don't know who told him. Nothing specific otherwise was called to my attention" (Record p. 26). On page 25 of the Record he identified "Eddy" as Mr. Morgan.

Mr. Youngs testified "Either Mr. Morgan or Mr. Owen made the statement about the exposed bus bar" (Record p. 31) and that the warning came at the time when the ditch was being laid out (Record p. 29).

If these men, particularly appellee, were misled by repeated warnings about the bus bar, the warnings must have come from their own foreman or fellow workers, not from Clinton. Incidentally, appellee testified to only one

warning about it. Clinton's warnings about the bus bar came at a time when the bus bar was a hazard to men other than appellee's crew, who were endangered thereby. It was perfectly reasonable to so warn.

In contending that the significance of the bus bar has been blown up beyond its proper proportion, we emphasize Mr. Youngs' testimony as follows: "**The exact location of that bus bar I don't know.** If I saw a bus bar I would recognize it immediately and I would know then where it was, **but I never actually saw the bus bar**" (Record pp. 30 and 31).

Does that testimony not indicate the truth of what significance was attached to this bus bar? Can the Court believe that it was constantly emphasized to the point that it became the sole danger in the minds of these men, and yet the appellee never even saw it?

We are constrained to call to the Court's attention statements appearing on pages 3 and 7 of the Petition for Rehearing which, if not actual misstatements, tend to mislead as to their import.

On page 3, appellee states that every witness repeats that the warning given was limited to the bare bus bar and that Morgan says his attention was never called to any exposed apparatus other than this bus bar. On page 7, he states that Morgan, Owen, Youngs and Sullivan all speak of the bus bar warning and that alone.

Mr. Morgan testified that he had received information that the area was all hot (Record p. 18) and that the person who said that all of this area was hot was Shorty Stapleton (Record p. 20). He further testified, with reference to Stapleton that, "He just said everything in there was hot. They were all hot" (Record p. 21) and that Mr Heinsen had told him, the whole bank was hot (Record p. 21).

Mr. Sullivan testified that he was warned that the whole place was hot (Record p. 35).

Appellee relies in part upon the testimony of the witness Owen that the men had been told that the bus bar was the only thing to worry about and that Morgan had so informed them. In view of Mr. Morgan's testimony as to what he told the men, there is grave doubt that any such statement was made. Nevertheless, appellant must concede that a jury could have found that Morgan had told his crew this.

However, no jury question can conceivably be raised by this testimony as to the negligence of Clinton. The only way in which Clinton could be responsible for the misleading information is if Clinton had misled Morgan. There is not a word in the record to indicate that Clinton ever stated that the bus bar was the only danger. Appellee would have the Court believe that repeated warnings about the bus bar created such a belief in Morgan's mind. However, Mr. Morgan's testimony indicates that he received only one warning about the bus bar, and that warning was prior to the digging of the ditch.

Irrespective of whether Clinton's statements about the bus bar **could** have misled Mr. Morgan, it is obvious that they **did not.** Morgan testified "I personally knew that these transformers were hot" (Record p. 20). He further testified "I told them they (the wires) were hot and the transformers were all hot" (Record p. 21).

It is obvious that Morgan was not misled by the warning he received about the bus bar. If, as Mr. Owen testified, he misled the men, it was the negligence of appellee's employer, Pittsburgh, and such negligence is in no way attributable to Clinton.

(Significance of Insulation on Lead-in Wire eliminated as dealing with a matter not now under consideration.)

CONCLUSION.

Appellant points out that the matters raised by the Petition for Rehearing relate solely to the knowledge of the appellee himself. We wish to emphasize the fact that we also contend that the positive knowledge of appellee's foreman, Mr. Morgan, which knowledge is undisputed, was sufficient, standing alone, to relieve appellant from any duty imposed by Iowa law.

For all of the reasons urged throughout the course of this appeal, appellant respectfully contends that the judgment in favor of appellee should be reversed.

Respectfully submitted,

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